IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34156

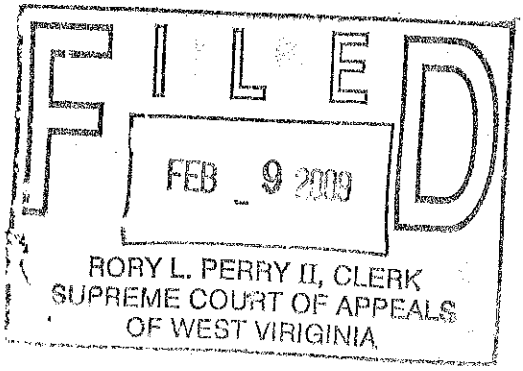
Mylan Laboratories Inc., Mylan Pharmaceuticals Inc.,
and UDL Laboratories, Inc., Appellants

vs.

American Motorists Insurance Co., Continental Insurance Co.,
Wausau Insurance Co., Federal Insurance Co.,
and Great American Insurance Co., Appellees

Appeal from the Circuit Court of Monongalia County, West Virginia
The Honorable Robert B. Stone, Judge
Civil Action NO. 07-C-69

BRIEF OF APPELLEE WAUSAU INSURANCE COMPANY



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ISSUE PRESENTED FOR REVIEW

1. Whether the Circuit Court correctly decided that Wausau Insurance Company ("Wausau") has no duty to defend Mylan Labs ("Mylan") against the underlying claims for disgorgement of ill-gotten gains, restitution, fines and penalties for Mylan's illegal activities.

RESPONSES TO MYLAN'S ASSIGNMENT OF ERROR

1. Mylan contends that the Circuit Court's order erroneously concluded that claims for statutory and antitrust violations could never trigger a defense under Wausau's commercial liability policies. (See p. 3 of Mylan's Opening Brief).

Response: The Circuit Court correctly concluded that underlying actions against Mylan were filed by Federal and State enforcement agencies, seeking criminal fines, penalties and restitution, distinguishing them from the cases cited by Mylan because the latter all involved private actions by a party whose idea has been misappropriated by another company (i.e., by parties who were directly or indirectly defined as competitors), even where the claims alleged antitrust violations. None of the cases cited by Mylan involved actions by state or federal enforcement agencies or third party payors. Nor did any of Mylan's cited cases hold that a duty to defend is triggered for claims arising out of criminal conduct.

2. Mylan contends that the Circuit Court erroneously evaluated the merits of the underlying cases instead of confining itself to the terms used in the allegations of the underlying complaints (See pgs. 4-6 of Mylan's Opening Brief).

Response: The Circuit Court reviewed all the allegations in the underlying cases, including the speculative allegations proffered by Mylan, as potentially supporting a duty to defend, and correctly concluded that neither the actual allegations in the underlying complaints nor the speculative allegations asserted by Mylan could potentially or even arguably invoke a duty to defend because undocumented and unasserted allegations do not invoke a duty to defend.

3. Mylan contends that the Circuit Court failed to inquire whether the "alleged facts" could lead to liability potentially within one of the "advertising injury" or "personal injury" offenses. (See pgs. 7-8 of Mylan's Opening Brief).

Response: The Circuit Court properly assessed the allegations in the underlying cases, and properly distinguished the actual allegations from the unsupported speculation by Mylan. In short, Mylan continues to argue that a duty to defend arises because unasserted hypothetical allegations could give rise to unasserted unknown claims and allegations by unknown and unidentified by parties other than the Federal and State enforcement agencies and third party payors which were the plaintiffs in the underlying cases.

4. Mylan contends that the Circuit Court erroneously presumed that the claimants in the underlying class actions were not directly injured. (See p. 8 of Mylan's Opening Brief).

Response: The Circuit Court correctly analyzed the underlying class action allegations and determined that the allegations sought recovery only for economic losses, not for bodily injuries, and also that the conduct described in the allegations was not "advertising injury" or "bodily injury" as defined in the policies issued by Wausau. Although the claimants in the underlying actions may have been directly injured, their direct injuries were purely economic in nature, and did not constitute "advertising injury" or "bodily injury."

I. INTRODUCTION

The Opening Brief filed by Plaintiff/Appellant Mylan Laboratories ("Mylan") should be rejected as it is a gross distortion of the nature of the claims in the underlying cases, the procedural posture of those cases, and the Circuit Court's bases for its February 8, 2008 decision in this case.

Mylan alleges numerous inconsistencies between the trial court's order and "settled West Virginia law". *Id.* at 1. In reality, the trial court did follow settled West Virginia law. Mylan attempts to make a case by citing to general legal principles out of context and citing to cases which are neither factually nor legally analogous to the case sub judice, a.k.a. pounding the proverbial square peg in a round hole. Mylan cites the law without more, implying that the trial court diverged therefrom, but provided no specific example of the same.

First, the Circuit Court recognized that where the underlying claims were not reasonably susceptible of triggering coverage, no duty to defend arises. See Judge Stone's Order at Pg. 33. See also *State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs.*, 208 W. Va. 713, 716, 542 S.E.2d 876, 879 (2000); *Silk v. Flat Top Const., Inc.*, 192 W.Va. 522, 525, 453 S.E.2d 356, 359 (1994); *State Bancorp, Inc. v. U.S.F.&G. Ins. Co.*, 199 W. Va. 99, 104, 483 S.E.2d 228 (1997).

Contrary to Mylan's claims, the contract terms at issue are not ". . . render[ed] . . . necessarily ambiguous . . ." In truth, no West Virginia law holds that the terms specified by Mylan are "necessarily ambiguous".

Rather, West Virginia law simply holds that the language in an insurance policy should be given its plain and ordinary meaning. Syl. Pt. 2, *Bancorp*, 199 W. Va. 99. "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Id.* citing Syl. Pt. 1, *Keffer v. Prudential Ins. Co., 153 W. Va. 813,* 172 S.E.2d 714 (1970). "It is a fundamental principle of insurance law that if the terms of an exclusion are plain and not ambiguous, then no interpretation of the language is necessary, and a court need only apply the exclusion to the facts presented by the parties." *State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs.*, 208 W. Va. 713, 716, 542 S.E.2d 876, 879 (2000).

Mylan uses overgeneralizations to suggest that the trial court was in some way required to interpret the unambiguous terms of the specified insurance policy provisions, but that it did not. However, the Circuit Court correctly found that the terms were not ambiguous as alleged, preventing it from interpreting the terms beyond their clear meaning. The Circuit Court relied upon established law in reviewing the terms. *Tacket v. Am. Motorists Ins. Co.*, 213 W. Va. 524, 584 S.E.2d 158, 162, (2003).

Moreover, the Circuit Court held that "advertising injury" coverage was not triggered even if Mylan's proffered definitions were used. Order at pg. 31, ¶1. In short, the Circuit Court correctly followed West Virginia law in deciding the case, and its decision should be upheld by this Court.

Second, Mylan's claims that the Circuit Court made "no findings of fact". Nothing is further from the truth. The Circuit Court made extensive findings of fact. See pages 3-28 of Judge Stone's Order, entitled "Findings of Fact".

Third, Mylan has claimed that the Circuit Court disapproved or overruled the Defendant/Appellee's arguments on the applicability of exclusions found in their policies. On the

contrary, the Circuit Court expressly stated that it was "unnecessary" to reach the issues of exclusions because Mylan could not meet its threshold burden of proof that there was an "occurrence" or that there was even an arguable basis for "advertising injury" or "bodily injury" as required as a prerequisite for a duty to defend and/or for coverage. Judge Stone expressly ruled as follows:

> "Having determined that the claims of the Plaintiffs fall outside of any coverage afforded by the relevant insurance companies, the Court need not address the issue of whether the claims fall within any named exclusions provided for in the policies."
>
> (P. 31 of Judge Stone's Order).
>
> * * * * *
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> "Having determined the claims of the Plaintiffs fall outside of any coverage afforded by the relevant Wausau policies, the Court need not address the issue of whether the claims fall within any named exclusions provided for in the policies."
>
> (P. 36 of Judge Stone's Order).

Fourth, Mylan mischaracterizes allegations which refer to the terms "marketing", and to "marketing the spread" in the AWP Actions, and to a "fair pricing campaign" in the L&C Actions in order to claim that they are allegations describing the kinds of injuries from which damages are sought in the underlying case which trigger the duty to defend. At most, the references to those terms in the underlying complaints were merely statements of historical information and/or background facts, which describe and relate only to the context of the cases and form the basis for allegations of criminal conduct. These terms do not describe the conduct giving rise to the claims or the nature of the alleged injuries to plaintiffs in the underlying cases.

The terms "marketing the spread" as used and/or alleged in the AWP Actions were just a description of the way Mylan took advantage of its prior fraudulent conduct. The terms "fair pricing

campaign" as used and/or alleged in the L&C Actions were merely terms used by Mylan in its public relations effort to place a positive spin upon its prior antitrust violations; they were coined and utilized after the indictments and prosecution were announced to neutralize the damages to its reputation. (Prior to these indictments, Mylan's conduct was performed in secrecy to avoid public scrutiny).

II. STATEMENT OF FACTS

There were two different sets of underlying actions: (1) the AWP Actions and (2) the L&C Actions. The first group of lawsuits, described by Mylan as the "Average Wholesale Price Litigation" or "AWP Actions," consists of 55 actions filed in jurisdictions around the country. In its Opening Brief, Mylan vaguely states that these actions "complained about pricing practices." A more complete and accurate description of the AWP Actions must include three significant aspects.

A. The AWP Actions Alleged Intentional Misrepresentation and a Fraudulent Scheme to Obtain Inflated Payments from Medicaid, Medicare, and Other Payors.

First, Mylan says little about the central allegation in the AWP Actions – that Mylan and the other defendants engaged in a fraudulent scheme to misrepresent drug prices and obtain inflated reimbursement from Medicaid, Medicare, and other payors. By way of background for these claims, the complaints at issue described the market in which Mylan and other defendants sold their drugs as follows:

> The drugs themselves are manufactured by enormous and hugely profitable companies such as defendants. Defendants sell the drugs . . . to physicians, hospitals, and pharmacies. These . . . providers then, in essence, resell the drugs to their patients when the drugs are prescribed for, administered or dispensed to those patients. Most patients have private or public health-insurance coverage. When a patient has such insurance, the price that is paid for the patient's prescribed drug ultimately will be paid . . . by a private insurance company, a self-insured entity, or a government entity (in the case of

> Medicare and Medicaid programs) . . . More often than not, the payer will make the reimbursement payment directly to the provider, not the patient.[1]

The AWP Actions alleged that when Medicaid and other payors determined the amount of reimbursement they would pay to providers, they did so based on the "Average Wholesale Price" or "AWP."[2] The Average Wholesale Price was defined as the average price paid by providers to pharmaceutical wholesale suppliers such as Mylan.[3] The AWP was published by several industry publishing services based wholly on information supplied by the drugs' manufacturers.[4]

According to the complaints, Mylan and the other defendants engaged in a scheme to submit intentionally false and inflated pricing information to the publishing services.[5] They allegedly did so knowing that their false information would cause the services to publish similarly inflated AWPs for their drugs, and knowing that Medicaid and other payors would rely on the AWP to set the amount of reimbursement they paid to providers.[6] The end result, according to the complaints, was the publication of "phony" AWPs that caused Medicaid, Medicare, and others to reimburse excessive amounts.[7]

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[1] Complaint, *State of Illinois v. Abbott Labs.*, No. 05CH02474 (Cook County, Illinois Circuit Court) (hereinafter "Illinois Compl."), ¶40

[2] *See, e.g.,* Complaint, *State of Alabama v. Abbott Labs., Inc.,* CV-05-219 (Circuit Court of Montgomery County, Ala.) (hereinafter "Alabama Compl."), ¶100; [Corrected] Consolidated Complaint, *In re Pharmaceutical Industry Average Wholesale Price Litigation,* MDL No. 1456, Civil Action No. 01-CV-12257-PBS (D. Mass.) (hereinafter "MDL Compl."), ¶5; Illinois Compl., ¶47.

[3] MDL Compl. ¶5; Alabama Compl. ¶100; Illinois Compl. ¶46.

[4] First Amended Complaint, *Commonwealth of Massachusetts v. Mylan Labs.*, Civil Action No. 03-CV-11865-PBS (D. Mass.) (hereinafter "Mass. Compl.), ¶31; MDL Compl. ¶85.

[5] *See, e.g.,* Complaint, *Thompson v. Abbott Labs., Inc.*, Case No. CGC-02-411813 (Super. Ct., City and County of San Francisco) (hereinafter "Thompson Compl."), ¶¶12, 73; Mass. Compl., ¶49.

[6] *See, e.g.,* MDL Compl., ¶¶9, 12.

[7] Illinois Compl., ¶64; MDL Compl., ¶130.

The alleged purpose of this scheme was to create a difference -- or "spread" -- between the AWP (used by Medicaid and others when paying reimbursement) and the true, lower price that the defendants actually charged the providers.[8] The defendants allegedly "marketed the spread" to providers by pointing out the difference between the drugs' actual cost and the reimbursement the providers would receive, and thus the potential for significant profit.[9] This practice, according to the complaints, offered providers who used their products an "illegal kickback,"[10] a "bribe,"[11] and an "unlawful," "improper," and "powerful financial incentive."[12] These providers, in turn, were "able to increase demand for a defendants' drugs and to select that defendant's drugs over competing drugs."[13] By these means, the defendants are alleged to have increased their own market share and profits at the expense of Medicaid, Medicare, and others.[14]

The AWP Actions alleged that nearly 80 of the nation's leading pharmaceutical companies engaged in these fraudulent practices.[15] The complaints state that misrepresenting and inflating

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[8] *See* Illinois Compl., ¶49; MDL Compl., ¶9.

[9] Illinois Compl., ¶50; Thompson Compl., ¶4; Alabama Compl., ¶108.

[10] First Amended Complaint, *State of Mississippi v. Abbott Labs., Inc.,* Civil Action No. 62005-2021 (Chancery Ct. of Hinds Co., Miss.) (hereinafter "Miss. Compl."), ¶9; Mass. Compl., ¶51.

[11] MDL Compl., ¶12.

[12] MDL Compl., ¶12; Illinois Compl., ¶68.

[13] Illinois Compl., ¶12.

[14] Alabama Compl., ¶110; Thompson Compl., ¶13; Illinois Compl., ¶67. Mylan's Opening Brief repeatedly uses the term "sticker price" when referring to the AWP. *See. e.g.,* Petition, 1, 10, 26. The Court should be aware that, despite the Petition's use of quotation marks, this term is not found in any of the AWP complaints. It appears that Mylan is attempting to unilaterally alter the allegations against it to sound more innocuous by suggesting that AWP is akin to the sticker price that consumers encounter when buying a car. In addition to being wholly a creation of Mylan, this characterization is not apt and is, in fact, quite different from the serious allegations made in the AWP Actions. Among other things, it is widely understood that no one pays sticker price for a car, and a difference between a sticker price and actual price is not illegal; the AWP complaints, in contrast, allege that Medicare, Medicaid, and other payors did pay inflated reimbursement based on AWP and that a difference between reported AWP and actual AWP is illegal.

[15] *See, e.g.,* MDL Compl., ¶¶34-73.

AWPs was "a far-reaching and widespread scheme in the pharmaceutical industry."[16] Indeed, according to the allegations, the practice was so widespread that it was the "'standard' and 'typical' industry practice."[17]

B. The AWP Actions Were Brought on Behalf of States, Political Subdivisions, and Others Who Paid Drug Reimbursement.

Second, it should be noted that the AWP Actions were brought on behalf of a variety of states (through their Attorneys General), counties, and other payors. These plaintiffs alleged that they were harmed because they made payments to healthcare providers based on the inflated AWPs – and were thereby overcharged by very substantial amounts – while Mylan and other defendants reaped increased profits. The AWP plaintiffs did not allege that "marketing the spread" was an idea that could be legitimately used by some companies. To the contrary, the allegation underlying all of their claims was that the defendants' conduct in "marketing the spread" was illegitimate, improper, and illegal.

C. The AWP Actions Alleged a Concealed, Secretive Type of Marketing

Third, according to the allegations in the AWP Actions, while the defendants marketed the "spread" to providers, they did not disclose that information to the public. Rather, Mylan and the other defendants allegedly acted to conceal that information. Mylan and the other underlying defendants allegedly engaged in schemes to "conceal the true price of their drugs" and "hide the true price" of their products, as well as ensuring that providers had incentives "to keep defendants' scheme secret."[18] Furthermore, the complaints state that the defendants "long have deliberately concealed that they marketed the spread" and "have deliberately concealed that the reason they

[16] *See* Alabama Compl., ¶115.

[17] *See, e.g.*, Illinois Compl., ¶52; Miss. Compl., ¶8.

[18] Illinois Compl., ¶¶59, 60, 65; Alabama Compl., ¶124; Mass. Compl., ¶33.

cause false and inflated AWPs to issue is to create spreads between actual costs and reimbursement amounts."[19] The defendants' "fraudulent promotional, marketing and sales practices" were allegedly conducted systematically and "secretly."[20]

The underlying complaints also allege Mylan engaged in a variety of practices, including the use of differential pricing, to conceal its fraudulent AWP reporting. *See, e.g.*, Sonlin Affidavit, Exhibit 48 (State of Illinois Complaint) at ¶62 ("Third, defendants further obscure the true prices for their drugs with their policy of treating different purchasers differently. Thus, for the same drug, pharmacies are given one price, hospitals another, and doctors yet another."). Mylan's use of differential pricing allegedly prevented the underlying plaintiffs from discovering sooner that they were consistently reimbursing medical providers and pharmacies more than they should have for Mylan's products.

In deciding whether there was a duty to defend the AWP Actions, the Circuit Court properly looked to those allegations in the underlying complaints that were the basis for the claims, to decide the insurers owed no duty to defend Mylan in the AWP Actions.

D. The L&C Actions Were Federal and State and Third-Party Payors' Enforcement Actions Alleging Antitrust Violations and Deliberate Intentional Conduct

The second group of underlying actions is referred to as the L&C Actions. On December 12, 1998, the FTC filed a suit, captioned *FTC v. Mylan Labs., et al.*, Case No. 1:98-CV-3114, in the U.S.D.C. for the District of Columbia ("FTC Action"), alleging that Mylan and others engaged in unfair methods of competition in or affecting commerce in violation of Section 5(a) of the FTC Act. *Id.* at 32; DJ Complaint at ¶45. The key allegations in the FTC Complaint are:

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[19] MDL Compl., ¶13.

[20] Mass. Compl., ¶1.

19. In 1997, Mylan embarked on a strategy to raise the price, and thereby increase the profitability of some of its generic drugs by seeking from its API suppliers, long-term exclusive licenses for the DMFs of certain APIs selected by Mylan because of limited competition. If Mylan obtained such an exclusive license, no other generic drug manufacturer could use that supplier's API to make the drug in the United States. Mylan sought these exclusive licenses because it believed that such contracts, by denying its competitors access to the APIs, would exclude some or all or them from the generic drug market, making it easier for Mylan to raise prices.

20. In determining the drugs on which to seek exclusive licenses, Mylan considered drugs with relatively few ANDAs and DMFs on file with the FDA, because such drugs had fewer competitors at the API and tablet levels. Ultimately, Mylan sought exclusive licenses for the DMFs for lorazepam API and clorazepate API as well as one other drug which is not the subject of this complaint.

21. Mylan began negotiating for exclusive licenses with Profarmaco and its distributor Gyma, which sold lorazepam and clorazepate APIs to Mylan.

22. ... At this time, Profarmaco (through Gyma) was the only source selling lorazepam and clorazepate API to generic manufacturers in the United States. FIS, which previously had supplied the U.S. market with lorazepam API, recently had exited the market because it no longer had any customers. With complete control of Profarmaco's supply of these products, and by refusing to sell any to its competitors, Mylan could deny its competitors access to the most important ingredient for producing lorazepam and clorazepate tablets....

25. Profarmaco and Gyma signed the ten year exclusive agreements licensing the two DMFs to Mylan on November 14, 1997. Through these agreements, Mylan obtained control over the supply of Profarmaco's APIs for lorazepam and clorazepate in the United States, denying Mylan's competitors (particularly Gyma's customers Watson and Purepac) access to these essential raw materials. In 1997, Profarmaco, though Gyma, supplied over 90% of the lorazepam API and 100% of the clorazepate API to generic manufacturers in the United States market....

28. On or around January 12, 1998, despite no significant increase in its costs, Mylan raised its price of clorazepate tablets to State Medicaid programs, wholesalers, retail pharmacy chains, and other customers by amounts ranging approximately from 1,900 percent to over 3,200 percent, depending on the bottle size and strength. For example, a 500 count bottle of 7.5 mg clorazepate tablets increased in price approximately from $11.36 to $377.00. On or around March 3, 1998, despite no significant increase in its costs, Mylan raised its price of lorazepam tablets by amounts ranging approximately from 1,900 percent to over 2,600 percent, depending on the bottle size and strength. For example, a 500-count bottle of 1 mg lorazepam tablets increased in price approximately from $7.30 to $191.00. The ultimate retail

price to consumers was even higher. Mylan's competitors matched these price increases for lorazepam and clorazepate tablets....

30. As a result of these substantial and unprecedented price increases for lorazepam and clorazepate tablets, many purchasers, including pharmacies, hospitals, insurers, managed care organizations, wholesalers, government agencies, and others, have paid substantially higher prices. Moreover, some patients may have stopped taking lorazepam and clorazepate tablets altogether, or been forced to reduce the quantity they take, because they can not afford them. *Id.* T1119-22, 25, 28, 30.

In addition, the FTC alleged that Mylan "acted with a specific intent to monopolize, and to destroy competition," "devised and implemented a calculated campaign to raise the price and profitability" of its products, "enter[ed] into a conspiracy to monopolize," "willfully acquired its monopoly power," and "willfully engaged in a course of exclusionary conduct in order to obtain a monopoly." *Id.* at TI47, 50, 53, 56, 59, 62, 68, 71, and 72.

Based upon these allegations, the FTC asserted eight causes of action:

(1) Agreement in Restraint of Trade on Lorazepam;
(2) Agreement in Restraint of Trade on Clorazepate;
(3) Conspiracy to Monopolize Generic Lorazepam Tablets Market;
(4) Conspiracy to Monopolize Generic Clorazepate Tablets Market;
(5) Monopolization of Generic Lorazepam Tablets Market;
(6) Attempted Monopolization of Generic Lorazepam Tablets Market;
(7) Monopolization of Generic Clorazepate Tablets Market; and
(8) Attempted Monopolization of Generic Clorazepate Tablets Market.

Id. at 12-19. The FTC requested that the court (a) find that Mylan violated Section 5(a) of the FTC Act; (b) permanently enjoin Mylan from engaging in such conduct; (c) rescind Mylan's unlawful licensing arrangements; and (d) order other equitable relief, including disgorgement and restitution in an amount exceeding $120 million plus interest. *Id.* at 20-21.

On December 22, 1998, thirty-two states, through their respective Attorneys General, filed suit against Mylan and other defendants in a suit captioned *State of Connecticut, et al. v. Mylan Labs., et al.*, Case No. I :98-CV-31I5, filed in the U.S.D.C. for the District of Columbia ("State Attorneys General Action"), alleging violations of Sections 1 and 2 of the Sherman Act, in addition

to various states' antitrust laws. *FTC*, supra, 62 F.Supp.2d at 34-35; DJ Complaint at 11146-49. The substantive allegations in the State Attorneys General Action are materially identical to those of the FTC Action, with the exception of an additional ninth count, which alleges that Mylan entered into an illegal price fixing agreement. Id. at 36; DJ Complaint at ¶48. Also, the State Attorneys General Complaint includes a section titled "Injury," which alleges:

> 104. As a direct and proximate result of the unlawful conduct alleged above, the States were not able to purchase lorazepam and clorazepate at prices determined by free and open competition, and consequently have been injured in their business and property in that, inter alia, they have paid more for lorazepam and clorazepate than they would have paid in a free and open competitive market. The States cannot quantify at this time the precise amount of damages which they have sustained, but allege that such damages are substantial. A precise determination of total damages will require discovery from the books and records of the Defendants and third parties.
>
> 105. As a direct and proximate result of the unlawful conduct alleged above, consumers in the Plaintiff States were not able to purchase lorazepam and clorazepate at prices determined by free and open competition, and consequently have been injured in that, inter alia, they have paid more for lorazepam and clorazepate than they would have paid in a free and open competitive market. The States cannot quantify at this time the precise amount of damages which their consumers have sustained, but allege that such damages are substantial. A precise determination of total damages will require discovery from the books and records of the Defendants and third parties.
>
> 106. As a direct and proximate result of the unlawful conduct alleged above, the general economies of the States have sustained injury, and are threatened with further injury to their business and property unless the Defendants are enjoined from their unlawful conduct.
>
> 107. Defendants' unlawful conduct is continuing and will continue unless the injunctive and equitable relief request is granted. The States do not have an adequate remedy at law. State Attorneys General Complaint at ¶¶104-107.

Between 1998 and 2001, third-party payors from around the country, including HMOs, welfare plans, self-insured employers and their coverage plans, and other consumers filed substantially identical complaints against Mylan (collectively "Purchaser Actions"). DJ Complaint at ¶¶54-56, 59,63. The FTC Action, the State Attorneys General Action, and the Purchaser Actions

were eventually resolved on February 1, 2002, when the judge in the FTC Action entered a final order approving a proposed global settlement. Id. at 1150-53; *In re: Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D. 369 (D.D.C. 2002). On February 9, 2001, an order for permanent injunction was entered in the FTC Action that required Mylan to pay over $135 million. DJ Complaint at 11151-52, 57, 58.

Two groups of plaintiffs opted out of the global settlement. Then, on December 21, 2001, a suit captioned *Health Care Serv. Corp., et al v. Mylan Labs., Inc., et al.*, Case No 1:01-CV-02646, was filed in the U.S.D.C. for the District of Columbia ("HCSC Action"). DJ Complaint at ¶63. The HCSC Action ultimately resulted in a roughly $12 million verdict against Mylan on June 2, 2005. Id. at 1164. As Mylan has stated to the SEC and the public:

> The jury found Mylan willfully violated Massachusetts, Minnesota and Illinois state antitrust laws in connection with API supply agreements entered into between the Company and its API supplier and broker for two drugs, lorazepam and clorazepate, in 1997, and subsequent price increases on these drugs in 1998. The case was brought by four health insurers who opted out of earlier class action settlements agreed to by the Company in 2001 and represents the last remaining claims relating to Mylan's 1998 price increases for lorazepam and clorazepate. In post-trial filings, the plaintiffs have requested that the verdict be trebled. Plaintiffs are also seeking an award of attorneys' fees, litigation costs and interest on the judgment in unspecified amounts. The Company filed a motion for judgment as a matter of law, a motion for a new trial, a motion to dismiss two of the insurers and a motion to reduce the verdict. On December 20, 2006, the Company's motion for judgment as a matter of law and motion for a new trial were denied. A hearing on the pending post-trial motions is scheduled for February 28, 2007. The Company intends to appeal to the U.S. Court of Appeals for the D.C. Circuit. Mylan's 2/9/07 10Q Report.

III. RESPONSES TO APPELLANTS' POINTS AND AUTHORITIES

A. Neither the AWP Actions nor the L&C Actions Allege Advertising Injury

(1) AWP Actions

Except for those complaints filed by the third party payors, the underlying cases were all filed by enforcement agencies at both the federal and state levels, and they all assert criminal and/or quasi-criminal causes of action. In the AWP Actions, third party payors and the enforcement agencies asserted the claim that Mylan participated in a "fraudulent conspiracy" to mislead the third party payors into making payments well in excess of those which were authorized by law. That is, the prosecuting authorities alleged that Mylan engaged in a conspiracy with pharmacy laboratories and pharmacy outlets and medical providers and hospitals to report that the "average wholesale price index" was far above the true amount of average wholesale prices which were actually charged to those providers, for the purposes of bilking the third party payors and Medicare agencies into paying a greater percentage of those charges than would have otherwise been collected under state and federal laws. Those allegations are based on intentional conduct to defraud. They are not allegations of advertising injury under any stretch of the imagination.

(2) L&C Actions

The allegations in the L&C Actions described a second conspiracy between Mylan and its suppliers to corner the market, exclude other competitors, and to engage in practices which multiplied the cost of generic medications by several hundred percent. The subsequent public relations campaign conducted by Mylan after its illegal conduct had been discovered was merely an effort at "spin" or an attempted "cover up," and had nothing whatsoever to do with the allegations in the criminal prosecution in the underlying cases. The Circuit Court properly disregarded the historical and background references to the "self-serving" press releases utilized by Mylan well after

the crimes had already been committed and which were prepared solely to neutralize the bad publicity. In other words, the Circuit Court correctly concluded that "damage control" press conferences are not "advertising injury" and therefore they do not trigger a duty to defend.

Regarding the L&C Actions, Mylan argued that its "fair pricing campaign" was an advertising injury triggering a duty to defend. In reality, the "fair pricing campaign" was first coined in Mylan's self-serving press releases which were issued after the initiation of indictments and prosecution by the enforcement agencies, that is, after the offending conduct was completed. It was intended to "spin" the news of the announcement of its criminal indictments, and it was actually a "cover up scheme" to divert attention from its prior criminal conduct.

(3) Neither the AWP Nor the L&C Actions Allege Advertising Injuries

The cases to which Mylan cites in its Opening Brief have no bearing upon these claims. Those cases all involve claims by "competitors" against an insured for the "theft" of "advertising ideas". The Circuit Court correctly concluded that those cases have no bearing whatsoever on the current coverage dispute, even though, in some of those cases, the competitors made claims based upon state and federal antitrust violations because the current cases were all filed by the enforcement agencies at both the federal and state levels, except for those filed by third party payors. Further, all the claims at issue here are for fraud and antitrust activities and for "theft of money", not the theft or conversion of advertising ideas.

None of the underlying cases brought against Mylan were claims by competitors for theft of their advertising ideas. Therefore, none of the cases cited by Mylan in its Opening Brief are analogous or in any way applicable to this case.

The Circuit Court properly found that the definition of "advertising injury" and/or the "use of another's advertising idea in your advertisement" requires a preliminary finding that there was a

"taking of an advertising idea, not just the use of a non-advertising idea that is made the subject of advertising." See e.g., *Green Mach. Corp. v. Zurich Am. Ins. Group*, 313 F.3d 837, 841 (3rd Cir. 2002) ("finding that misappropriation of advertising ideas means the "wrongful taking of an idea for the solicitation of business and customers"); *Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 748 (3rd Cir. 1999); see also, *Amazon.com Int'l, Inc. v. Am. Dynasty Surplus Lines Ins. Co.*, 85 P.3d 974, 976 (Wash. Ct. App.) (noting that "[M]isappropriation of an advertising idea may be accomplished by the 'wrongful taking of another's manner of advertising,' by 'the wrongful taking of the manner by which another advertises its goods or service.'"); *Am. States Ins. Co. v. Vortherms*, 5 S.W.2d 538, 543 (Mo. Ct. App. 1999) (stating that "misappropriation of an advertising idea involves the wrongful taking of an another's manner of advertising"); and *Flouroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 682 (Minn. Ct. App. 1996) (same). (See pp. 29 and 30 of Judge Stone's Order).

The Circuit Court also correctly found that in order to trigger a duty to defend under "advertising injury" coverage, the underlying claims must allege wrongful taking of the claimant's advertising idea, not the advertising idea of some third party. After carefully reviewing the cases as cited by Mylan, the Circuit Court determined that none of the plaintiffs in the AWP or the L&C Actions were competitors of Mylan. Therefore, Mylan's claims that they were owed a duty to defend on the basis of advertising injury must fail. (p. 30 of Judge Stone's Order).

The Circuit Court correctly concluded that none of the damages being sought resulted from Mylan's "marketing of the spread". Rather, the damage resulted from Mylan's conduct in misrepresenting the AWP prices. The trial court correctly found that Mylan's "fair pricing campaign" in the L&C claims was only a cover up scheme after the conduct which gave rise to the antitrust activities.

The Circuit Court properly determined that there was no ambiguity in the policy language as applied to this case, and, therefore, even if the court were to adopt Mylan's assertion that the term "misappropriation" could mean "misuse" of an "advertising idea", there was still no duty to defend nor coverage because (1) this activity did not involve an "advertising idea" and (2) the claims were not brought by the party whose idea had been misused.

Likewise, the trial court found that the L&C claims did not invoke a duty to defend under the "advertising injury" coverage since none of the plaintiffs in the L&C suits were in competition with Mylan. Even if the L&C suits were brought by Mylan's competitors, the Circuit Court found that the L&C suits did not allege "advertising injury" because there were no allegations of misappropriation or improper use of "advertising ideas". (See discussion and cases cited at p. 33 of Judge Stone's opinion).

Mylan argues that there need not be a causal connection between the wrongful conduct described in the underlying cases and the injury to the underlying plaintiffs in order to give rise to a claim for advertising injury. The Circuit Court correctly rejected Mylan's argument, citing to numerous supporting cases at page 34 of Judge Stone's Order. Moreover, Mylan's argument misses the point, which is that the underlying complaints do not allege that "marketing the spread" and the "fair pricing campaign" directly caused any of the underlying plaintiffs' alleged damages. They had nothing whatsoever to do with the conduct which was the basis for the claims in the underlying cases. Accordingly, regardless of whether there is a requirement for causal connection, those public relations campaigns, and self-serving, after-the-fact press releases, do not support an allegation that there were any underlying claims triggering "advertising injury" coverage for Mylan.

Mylan's strategy is to isolate individual words or phrases in each insurance policy in question and then cite to cases in which that word or phrase was interpreted in a manner which would

arguably favor Mylan's position, without reference to the factual setting. This tactic is repeated over and over again, but Mylan hides the obvious truth that the cited cases are not factually or legally analogous to the facts in this case. All but one, i.e., *Knoll, infra*, of those cases were filed by the competitors of the insured and/or by the party who was directly injured seeking civil damages, not by the FTC or State Attorney General or third party payors. Therefore, those cases are cited entirely out of context and have no bearing upon the present matter, and/or have been reversed on appeal.

Although Mylan cites to over 125 cases and other "authorities" in its 164 footnotes, none of the cited cases presents the same or even a similar factual context as presented in this matter. It is significant that Mylan has failed to locate or cite to a single case in any jurisdiction which involves the same or even an analogous fact pattern except for one case discussed below which has been severely criticized and effectively reversed. That is, none was an action filed by the prosecuting attorneys on behalf of the states nor by the FTC seeking criminal penalties, nor by third-party payors, except for the one wrongly-decided case discussed below.

Mylan relies most heavily upon *Knoll Pharmacy Co. v. Auto Ins. Co.*, 152 F. Supp. 2d 1026, 2001 U.S. Dist. LEXIS 9808 (N.D. Ill. 2001). (*See*, citations at p. 5, §VB(4) and footnote 23, p. 15, footnote 60 and §V(C)(5)(b)p. 34, footnotes 130 and 131). Mylan, however, fails to acknowledge that this decision has been both severely criticized and rejected, and was effectively reversed by the Seventh Circuit Court of Appeals in a follow up decision in the series of cases known as the *Synthroid Marketing Cases*. This reversal is of great significance because *Knoll Pharmacy* was the primary case upon which Mylan relies and is the only case which could be read to be factually and legally, analogous to the facts in our present case.

Specifically, in *BASF(AG) v. Great Am. Assurance Co.*, 522 F.3d 813, 2008 U.S. App. LEXIS, 8085 (7th Cir. April 14, 2008), the Seventh Circuit Court of Appeals repudiated and/or

overruled the holdings in the *Knoll Pharmacy* District Court decision. The analysis of the Seventh Circuit Court of Appeals is most instructive since it analyzes the same issues and arrives at the correct determination. It is, therefore, the closest precedent that could be followed in this case.

In that case, the manufacturer of Synthroid thyroid medication commissioned a study by Dr. Betty Dong of the University of California, San Francisco (UCSF). The manufacturer hoped the study would prove that Synthroid and its competing drugs, including cheaper generic hormones, were not bioequivalent. That is, that they were not drugs that had the same effect on a patient in terms of potency and absorption rate when equal doses are administered. However, Dr. Dong discovered that the Synthroid and its competitors were in fact bioequivalent and that all of the compared synthetic hormones, including the cheaper generics, were as effective as Synthroid at treating thyroid diseases. When it learned of these results, the manufacturer immediately sought to discredit Dr. Dong and her findings. The manufacturer's own scientists sent letters to Dr. Dong questioning her methods and conclusions and the manufacturer asked UCSF to terminate the study. The university refused, however, and Dr. Dong proceeded to produce a final report showing that Synthroid and its competitors were bioequivalent.

Even after the manufacturer learned of Dr. Dong's results, however, the manufacturer continued to publicly advertise that Synthroid had no known bioequivalent and that its drugs were unique. In early 1995, the manufacturer exercised its right under its contract with Dr. Dong to block the publication of her study. However, in 1996, *The Wall Street Journal* learned of Dr. Dong's study and published an expose on the manufacturer and its product Synthroid. The article revealed to the public that there were cheaper alternatives to Synthroid, and that Boots had prevented the publication of Dr. Dong's study, which confirmed that the cheaper alternatives were equally effective. On the heels of *The Wall Street Journal* article, and the publication of Dr. Dong's study,

over 70 lawsuits (mostly class action) were filed against Knoll (and its successor, BASF) and its employees. These suits filed by consumers and health insurers alleged a potpourri of antitrust, racketeering, fraud, misrepresentation, deceptive-business-practices and unjust enrichment claims, all based on the fact that the manufacturer had deceived consumers into purchasing Synthroid. In 1997, the lawsuits were consolidated into multi district litigation in the Northern District of Illinois. *See, In re Synthroid Mktg. Litig.*, 188 F.R.D. 295 (N.D. Ill. 1999) (certifying Synthroid consumer class) and 188 F.R.D. 287 (N.D. Ill. 1999) (certifying Synthroid third-party payor class).

The gravamen of the consolidated complaints was that Knoll, BASF, and their employees had wrongfully asserted monopoly control over the market for thyroid medication, which resulted in consumers and health insurers paying higher prices for Synthroid rather than purchasing lower cost, equally effective alternatives. Both complaints claimed that the defendants had exercised monopoly control by suppressing Dr. Dong's study and criticizing her methodology and results, by concealing known facts about Synthroid, and by marketing Synthroid as a uniquely superior drug despite knowledge to the contrary. Both complaints sought economic damages for the class members (both consumers and health insurers) who overpaid for Synthroid. Neither complaint sought damages on behalf of Dr. Dong or on behalf of the competing thyroid manufacturers, and neither complaint alleged defamation, libel, disparagement, or slander.

When that case was settled, , Knoll filed suit against its primary insurers. The district court found that there was a duty to defend. *Knoll Pharmacy v. Auto Ins.*, 210 F. Supp. 2d 1017. The primary insurers appealed to the Seventh Circuit, but the case was settled for a significant discount after oral argument but before a decision by the Seventh Circuit.

Knoll and BASF then pursued another action, against the excess insurers, arising out of the same claims. Once again, the district court, relying on the previous decision in *Knoll Pharmacy*

found that there was coverage and a duty to defend and allowed the case to go to a jury. After a jury verdict in favor of BASF, however, the excess insurers appealed to the Seventh Circuit Court of Appeals.

After reciting the appropriate standards for review, the Seventh Circuit Court of Appeals rejected the same arguments which Mylan presents in this case and held as follows:

> We believe the facts in the Synthroid complaints are simply insufficient to sketch a claim for the common law offenses of libel, slander, or disparagement, which in Illinois all require that a false statement be made ***about the plaintiff.*** (Citing to five different Illinois appellate cases). **Neither the consumer class action complaint nor the third party payor complaint** claimed that Boots or its related entities made defamatory, libelous, slanderous or disparaging statements **about the class members or their products**. And the Synthroid complaint's omission of a claim for common law libel, slander, or disparagement makes sense because the only allegedly actionable **statements did not "disparage" thyroid patients or health insurance providers** - they targeted Dr. Dong's study as unreliable, and the other thyroid drugs as unsuitable bioqualvents of Synthroid. (Emphasis added).
>
> In addition to the requirements of Illinois common law, the *Synthroid* class plaintiffs would have faced a further obstacle to sketching a claim for libel, slander, or disparagement based on the statements about Dr. Dong and Synthroid's competitors - the class action plaintiffs would not have had standing to sue (citing to numerous Illinois cases). **But the parties injured by the allegedly disparaging statements** - Dr. Dong, her research affiliates, and the producers of competing thyroid drugs - **were not part of the *Synthroid* plaintiff cases.**
>
> Despite the Synthroid complaint's failure to sketch a common law claim for libel, slander or disparagement, BAS argues that the umbrella insurers still had a duty to defend it in the *Synthroid* litigation because the consumer plaintiff class **implicitly advanced** a disparagement claim by pleading that Boots violated Illinois Consumer Fraud and Deceptive Practices Act...
>
> * * * *
>
> BASF argues that similarly, coverage is warranted under the umbrella insurance policies at issue because a claim for

disparagement is implicit in the *Synthroid* plaintiff statutory claim under the CFA. But we do not believe that this case is analogous to the *Valley Forge* case....

* * * *

Nevertheless, **BASF urges us to adopt the expansive position of the district court** - that the *Synthroid* complaints **did not need to assert every element of an offense** delineated by the umbrella insurance policies **in order to trigger the umbrella insurer's duty to defend**, because the language in the umbrella policies required the umbrella insurers to cover claims that '**may have had their origin in' the offenses of libel, slander or disparagement**. However, following this approach would unmoor coverage determinations from the factual allegations of the complaint - something that Illinois law will not permit us to do. (Citing to Illinois cases)...

* * * *

Abandoning focus on the complaint would mean that the breath of insurance coverage 'could be extended indefinitely'. *See, Great Am. Ins. v. Riso, Inc.*, 479 F.3d 158, 162 (1st Cir. 2007). **The consumer and third-party payor complaints pursued only economic damages for the injuries they suffered from the artificially high prices for Synthroid which stem from monopolization and fraudulent concealment of Boots and others - this is a paradigmatic antitrust injury.** (Omitting cites). If we allow BASF to shoehorn these collateral claims into the umbrella policies coverage for slander, libel or disparagement, then an insured could easily transform a run of the mill antitrust or securities action into a suit seeking redress of libel, slander, or disparagement. As our sister court has noted in a factually similar case; it would not be far fetched to imagine a securities fraud action in which the false boasting of a seller's stock involved or implied discouragement of a competing stock that the buyer was considering. *Riso*, 479 F.3d at 162. Reading an insurance policy's coverage provisions as expansively as BSF desires would be a precarious proposition; it might sweep within the breath of the policy's risk that the insurers did not and would not contract to cover - risks that were not considered when setting the premiums for the policy.... This in turn would make insurance contracts less predictable and more costly for insurers, who would rationally pass the cost onto their insureds, making insurance more expensive for everyone....

* * * *

> **We, therefore, decline to adopt the sweeping definition of 'arising out of' that the district court employed.**
>
> In concluding that the *Synthroid* complaints fell within the coverage of the umbrella insurance policies, **the district court relied almost exclusively on the decision against the primary insurers in *Knoll. See*, 152 F. Supp.2d at 1031, 1039**. Because it appears that the primary insurance policies and umbrella policies utilize the same definitions of personal injury and advertising injury, **we are not certain that the *Synthroid* complaints alleged claims within the scope of the primary policies either**. But the appeal of that case settled before we had the opportunity to adjudicate its merits. **Therefore, the district court's reliance on the *Knoll* decision was understandable, if regrettable.**
>
> **Because we hold that the umbrella insurers had no duty to defend BASF from the *Synthroid* litigation, it necessarily follows that the umbrella insurers also did not have a duty to indemnify BASF for the settlement**.... The umbrella insurers were entitled to judgment as a matter of law and summary judgment should have been entered for the umbrella insurers on BASF's breach of contract claims." *Id.* at pp. 820-823. (Emphasis added).

Knoll Pharmacy was also criticized and/or distinguished in *Great Am. Ins. Co. v. Riso*, 479 F.3d 158 2007 (1st Cir. 2007). Again, in that case, the underlying suit involved a garden variety antitrust action. The complaint did not allege that either the underlying plaintiffs or their goods, products or services were ever disparaged by the insured. The district court found there was no duty to defend and the district court's ruling was upheld by the First Circuit Court of Appeals. Referring to the *Knoll Pharmacy* decision of the Northern District of Illinois in 2001, the First Circuit observed:

> **Admittedly, one federal court in another district has followed BSO's logic into new territory.** But we think it more telling that the Massachusetts Appeals Court has declined to read BSO expansively.
>
> Riso argues that the policy language refers to 'material...that disparages a person's or organization's goods, products or services'.... The indefinite article 'a' says Riso, indicates that the disparaged party need not be the same as the underlying plaintiff so long as the latter's injuries are causally connected to **covered conduct. Compare**

> ***Knoll*, 152 F. Supp. 2d at 1034.** And Riso reminds us that ambiguities in policy language are to be construed against the insurer....
>
> **The ambiguities canon only where the policy can be reasonably read two ways, and the touchstone of coverage is 'expectation of protective insurance reasonably generated by the terms of the policy'**.... Whatever the explanation for using 'a', the relevant core language in Riso's policies is for defamation and commercial disparagement, and **we think it unlikely in the extreme that the policy drafter or purchaser intended coverage for the antitrust offense framed in the complaint.**
>
> We hold that the district court correctly ruled that the insurer did not have a duty to defend Riso against the antitrust complaint... **A complaint brought by plaintiffs who never themselves suffered any reputational injury and whose allegations of disparagement instead concerned anticompetitive conduct directed against others not party to the suit.** On the present facts, this conclusion also negates any apparent basis for the duty to indemnify. (Pgs. 162-163). (Emphasis added).

See, also *Purdue Frederick Co. v. Steadfast Ins. Co.*, 801 NYS 2nd 781 (N.Y. Mis. 2005). In the latter case, the insured was sued by individuals and class actions who were "end payors," such as insurance companies, who claimed that Purdue, by its fraudulent actions in obtaining patents, and in bringing baseless actions, had stalled the release of the generic version of Oxycontin, causing these plaintiffs to pay more for the drug than they would have for a generic version if it had been available. As set forth above, these plaintiffs brought claims against Purdue alleging among other things, violations of federal and state antitrust laws, state consumer protection statutes, unfair and deceptive trade practice and unjust enrichment. The court analyzed the facts as alleged by the plaintiffs in the antitrust actions and determined that the plaintiffs could not allege any of the policy's enumerated or covered torts because the antitrust plaintiffs themselves had not been the direct victims of any of the enumerated offenses:

> New York's interpretation of 'arising out of' in general liability insurance contracts is indeed broad... (however) New York's Court

> of Appeals has determined that the phrases 'based on' and 'arising out of' are unambiguous and legally indistinguishable. (Omitting cites).
>
> **The court in *Knoll*, using Illinois law**, and unlike that in *QSP*, found that the term 'arising out of' was ambiguous and so would be held against Knoll's insurers.... Therefore, the *Knoll* court ruled that the antitrust allegations of economic injury arose from slander, libel, and disparagement that *Knoll* had allegedly aimed at third parties, and so, 'arose out of' those covered offenses.... **This court finds that *Knoll* takes the definition of 'arising out of' too far**... Therefore, this court finds, as did the court in *QSP*, that 'arising out of' requires scrutiny of the injuries sustained by these plaintiffs rather than the underlying offenses that Purdue claims caused these injuries... **The underlying plaintiff's injuries did not originate from and or were not incident to and have no connection with the torts which Purdue claims caused these injuries**... An insurer will be relieved of the duty to defend, despite the broad obligation to defend imposed by law, where, as a 'matter of law', there is possible factual or legal basis upon the insurer might eventually be held obligated to indemnify the insured under any provision of the insurance policy. (Citation omitted). **Defendants will never be required to indemnify Purdue from malicious prosecution, a tort not raised in the underlying actions. Therefore, the duty to defend cannot be expanded to cover the underlying actions.** *Id.*, pp. 5-7. (Emphasis added).

The most recent decision on the subject is *Sony Computer Ent. Am. , Inc. v. American Home Assurance Co.* (9th Cir. 2008), 532 F.3d 1007. In that case, the Ninth Circuit refused to extend coverage for claims involving 'false advertising' because none of the lawsuits alleged physical harm to third party property, such as CGL policies are designed to cover.

Furthermore, Mylan cites at page 4, footnote 16 to the case of *Westchester Fire Ins. Co. v. G Heileman Brewing Co., Inc.*, 321 Ill. App. 3d 622, 747 N.E. 2d 955 (2001), for the proposition that the "majority of courts" have found personal injury coverage for "discrimination" implicated in antitrust lawsuits, including Sherman Act claims. Appellant, however, purposely omits to mention the crucial distinguishing fact that the plaintiffs in the underlying case in the *Westchester Fire* decision were bodily injury and property damage victims. The plaintiffs were not state and federal

prosecutors filing actions for criminal offenses seeking fines and penalties. The plaintiffs were not third-party payors such as the medical insurers who are plaintiffs in the present action.

Therefore, Mylan's bald representation at page 4 of its Opening Brief, i.e. that "a majority of courts" has found coverage in antitrust lawsuits, including Sherman Act claims, is a glaring misrepresentation to this Court, which is characteristic of Mylan's favored tactic – what appears to be an ends justifies the means mentality. Actually, courts around the country have consistently rejected coverage for antitrust and fraud lawsuits like the ones for which Mylan seeks coverage here. The cases relied upon by Mylan are not factually analogous because they all involved claims brought by competitors of the insured, who were directly harmed by the insured's anti-competitive conduct.

For example, Mylan cites to *Fed. Ins. Co. v. Stroh Brewing Co.* (1997), 127 F.3d 563, for the proposition –that "a majority of the courts…have found…coverage in antitrust lawsuits, the latter including Sherman Act claims". True to form, Mylan hides the fact that the plaintiff in *Stroh Brewing* was Colument, a wholesale beer distributor in Indiana, complaining that it was excluded from the market by *Stroh's* anti-competitive conduct.

Since plaintiff was a competitor and not the prosecuting attorney for the State of Indiana or the FTC, that case is not factually or legally analogous. It is not supportive of Mylan's statements and/or its arguments boldly pronounced in its brief.

Similarly, the plaintiff in the underlying suits in *Curtis Universal, Inc. v. Sheboygan Emergency Med. Servs.*, 43 F.3d 1119, was a competing ambulance service, who filed a civil action for damages to its own business. And, the plaintiff in *American Cyanamid v. American Home Assurance Co.*, 30 Cal. App. 4th 969, 1994 Cal. App. LEXIS 1250, was also a competing manufacturer of chemicals and lighting products which filed a civil action for damages for loss of

business resulting from Cyanamid's monopolistic and anti-competitive conduct. Neither were criminal actions initiated by the Attorney Generals, FTC, nor third party payors.

St. Paul Fire & Marine v. INA, 501 F.Supp. 136, 1980 U.S. Dist. LEXIS 9527 is entirely irrelevant. It was a fire loss claim and the coverage dispute was between the primary and excess insurers.

Likewise, Mylan's other representations are misleading. For example, Mylan argues that: "It is of no moment that the asserted claims include alleged statutory violations in class action complaints or alleged violations of antitrust laws." (Pgs. 2 and 3 of Mylan's brief). In support of that misleading statement, Mylan cites, at footnote 11, to *Valley Forge Ins. v. Swiderski Electronics Inc.*, 223 Ill.2d 352, 365, 860 N.E. 2d 207, 315 (2006). The quote within that footnote, cited by Mylan, reads as follows:

> "11. Class action lawsuits asserting violations of the TCPA have been routinely held to trigger coverage. *Valley Forge Ins. v. Swiderski Electronics Inc.* (citation omitted). The receipt of an unsolicited fax advertisement implicates a person's right of privacy insofar as it violates a person's seclusion, and such a violation is one of the injuries that a TCPA fax ad claim is intended to vindicate."
>
> 12. *St. Paul Fire & Marine Ins. Co. v. Medical X-ray Center PC*, 146 F.3d 593, 594-95 (8th Cir., Minn., 1998). "Antitrust and interference claims by competing radiologists".

It is clear from the citations that the claims asserted in those actions were brought by competitors or by the person who was directly injured and who was claiming a violation of the right of privacy. Those were not cases filed by the Attorneys General of 48 states or the FTC seeking criminal penalties for violation of antitrust laws. Once again, therefore, Mylan's citations to these cases are totally misleading to the West Virginia Supreme Court.

Mylan's footnote 12 in its Opening Brief contains citations to 11 different cases. Each of the cited cases involves claims brought by individual competitors, not claims by the State Attorneys General or third party payors. Not one of them is therefore, analogous to, or even persuasive authority for the facts in our case.

THE AWP ACTIONS

Mylan acknowledges that it was "sued along with other numerous pharmaceutical companies for pricing practices in 55 law suits referred to as the average wholesale price actions (AWP Actions)." (p. 6 of Mylan's Opening Brief). However, Mylan fails to acknowledge that these 55 suits were not brought by individual competitors or consumers who were directly injured in those cases.

Indeed, Mylan cites to only three of those cases which, in turn, are filed by the Commonwealth of Massachusetts, the State of Illinois and the State of Alabama as the basis for its claims that those allegations invoke a duty to defend. *See*, fn. 28, 29 and 30 in Mylan's Opening Brief.

Yet, in support of its claim that the allegations in those cases give rise to a duty to defend, Mylan can find only five paragraphs in those three complaints which might be relevant to the duty to defend. The first is merely background information. (Id. at ¶37).

The second through the fifth paragraph contain only four words or phrases out of 55 lawsuits, containing hundreds of paragraph allegations in each, which Mylan cites for support of its claims that a duty to defend arises. However, as will be demonstrated below, not even those four words or phrases invoke a duty to defend in context of those cases.

Mylan cites at ¶44 of the Commonwealth of Massachusetts case to the following language:

> The WAC...AWP...and other prices reported by each of the defendants directly or indirectly to the Commonwealth (the state

> authority) do not reflect, and have no correlation to the actual prices charged to customers for pharmaceutical products in the market. Rather, those reported WAC and AMP prices are materially inflated.

The references to materially inflated prices do not constitute an advertising injury since they are merely a statement of prices, which are incorrect. Furthermore, it is a criminal violation and the action is being brought by the Commonwealth of Massachusetts, not by competitors or by its customers. It does not create a duty to defend. Even if this reference to false statement of prices were an advertising injury, it would be excluded by an express exclusion contained in the policies issued by Wausau Insurance for "the wrong description of price". *See*, 2000-2001 Wausau Policy, Exclusion (B)(3) for advertising injury arising out of "the wrong description of the price of goods, products or services (1997-2000 policies) and (A)(8) arising out of the wrong description of the price of goods, products or service stated in your advertisement".

Mylan's second reference is to paragraph 50 in the State of Illinois case:

> Defendants often market their products by pointing out (explicitly and implicitly) that their drug spread is higher than that of a competing drug.

Mylan's Opening Brief at 6. Whether or not defendants marketed their product by pointing out that their drug spread is higher than that of a competing drug is not a claim for advertising injury. Rather, it is an allegation setting forth the basis for alleging a criminal violation which is being prosecuted by the State of Illinois, not by a competitor who claims to be injured as a result thereof.

Third, Mylan cites to ¶59 in the State of Illinois case:

> Defendants have further exacerbated the inherent complexities of the drug market by utilizing drug schemes which conceal the true price of drugs in several different ways. (emphasis added)

Id. By the language of that complaint, it is clear that these schemes were "concealed" and not that they were advertised or used in order to disparage its competitors or to attract consumers. Furthermore, the actions are not brought by consumers, but rather by the State of Illinois for criminal violations.

Fourth, Mylan argues that the following language in ¶107 creates a duty to defend:

> Defendants used undisclosed discounts, rebates and other inducements which had the effect of lowering the actual wholesales or sales prices charged to their customers as compared to the reported prices.... As a result of these concealed inducements, defendants have prevented third parties including *Alabama Medicaid* third parties including Alabama Medicaid from determining the true prices it charges its customers. (emphasis added)

Id. Once again, it is clear from the statement that the allegations set forth the basis for alleging a criminal violation and also that the complaining parties are third parties (third party payors) and those include the State of Alabama Medicaid Agency. The complaints are not brought by the customers themselves. Furthermore, undisclosed and concealed discounts are not "advertising".

Accordingly, it can be seen that Mylan's tactics are a deliberate effort to distract the West Virginia Supreme Court from the true facts and circumstances underlying those complaints. Mylan does so through the implied misrepresentation that these claims and cited case authorities were cases brought by third parties to mislead this court in hopes that it will incorrectly conclude that these cases support a finding that there is either coverage or a duty to defend. Mylan's reliance on these tactics is all encompassing and recurrent throughout its brief – evidencing its desperation and a complete lack of any viable support for its claims.

In similar fashion, Mylan proceeds at page 21 of its Opening Brief to make the bold general statement:

> "Fifth, there is no contextual reason why the policy term misappropriation must be limited (as the court's analysis assumes) to wrongful taking from a competitor as opposed to the public, which suffers when goods are misdescribed as is alleged here. (emphasis added)
>
> Footnote 82. "Indeed, public deception is as much a common theme as an express wrongful taking from a competitor."

To support this inaccuracy, Mylan cites to the case of *State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am.*, 343 F.3d 249, p. 257 (4th Cir., N.C. 2003). A quick review of *State Auto* case, however, reveals that the argument is, again, misleading. Mylan implies that *State Auto* is authority for the proposition that a claim for misappropriation of advertising ideas need not be made by a competitor, and that merely deceiving the public is enough to establish a claim for advertising injury. This is a false reading of *State Auto*. A cursory review of the opinion establishes that the underlying case, which was the subject of the coverage dispute, was brought by Nissan Motor Company Ltd. and Nissan North America Inc. against NCC, which is the owner of a business computer sales and services company.

In other words, the suit under analysis in *State Auto* was not a claim arising out of general public deception but rather a claim for misappropriation of the personal property and trademarks of the Nissan Motor Co. and Nissan North America, making it a private suit by a competitor.

Once again, it is clear that Mylan is misquoting and misrepresenting case authorities in order to deceive this court.

On page 26 of its Opening Brief, Mylan embarks upon the ultimate extension of its skewed analysis. Mylan attempts to persuade the court that "misappropriation of the style of doing business" is sufficient to establish an advertising injury in the context of this case by quoting to other cases which are not analogous in the least respect. For example, in *Novell, Inc. v. Fed. Ins. Co.*, 141 F.3d 983, 987 (10th Cir., Utah 1998), Mylan finds language which adopts the definition of

advertising injury as a "style of business" which must include the manner in which a company promotes, presents and markets its products to the public.

A quick check of *Novell*, reveals, however, that the underlying suit was brought by a sole proprietor by the name of Ross against Novell/WordPerfect, a computer company. In his suit, he alleged that Novell/WordPerfect discouraged third parties from developing programs to compete with it. Ross claimed fraud, negligent misrepresentation, breach of contract, breach of fiduciary duty, unfair competition, and intentional interference with prospective economic advantage.

Claims like those brought by *Ross* against Novell are factually and legally distinguishable from cases brought by the FTC and/or State Attorneys General or third party payors for criminal violations of the antitrust laws. Those cases do not support the general propositions being advanced by Mylan.

At pages 27 and 28 of its Opening Brief, Mylan recites the rather damaging and embarrassing allegations describing its fraudulent conduct in the case of *County of Albany v. Abbott Labs.*, which is a criminal proceeding. Mylan ignores the criminal charges and claims that the manipulation of average wholesale price programs is an "advertising activity" by describing it as merely a "particular mode of interacting with drug purchasers". Mylan argues that it comes within the broad definition of "advertising injury". According to Mylan, "marketing the spread" is advertising no less than a "style of doing business". However, curiously, Mylan does not cite or quote to a single case which supports this broad generic proposition.

Footnotes 105 and 106 of Mylan's Opening Brief address an entirely different argument. Nor does Mylan's footnote 104, referencing *Elcom Technologies v. Hartford Ins.*, support its argument. In that case, suit was brought against Elcom by one of its business competitors. Likewise, the case of *Hoosier Ins. Co. v. Audiology Found. of Amer.*, 745 N.E.2d 300 was a suit

brought by an audiologist against an audiology foundation which was a trade association over the issue of credentialing. Once again, that was a private action by an individual, claiming to have been directly damaged. It was not a criminal action brought by the State Attorney General. None of these case citations, therefore, support Mylan's basic argument.

Certainly, *Acuity v. Begadia*, 750 N.W.2d 817, 828 (Wisc. 2008), and/or *Murray v. State Farm Fire & Cas. Co.*, 203 W.V. 4744, 509 S.E.2d 1 (1998), do not support Mylan's argument. In each of these cases, the underlying complaints were filed by individual parties, not the state prosecuting authorities.

This pattern continues on, *ad nauseum*, throughout the analysis of advertising injury continuing from page 29 through 38. Mylan even cites to a paper written by Mylan's counsel, David Gauntlet, at footnote 109 in support of its arguments. Even if Mr. Gauntlet's article were authoritative, it does not cite to a single case which is factually and legally analogous to the present case.

It is important to note that each of the cases Mylan relies upon as defining "advertising injury" coverage are also distinguishable from the facts here. Mylan's cited cases involved advertising which misrepresents a product as being something it was not, i.e. pure, true, better, the one and only, etc., for the purpose of increasing sales of same and injuring its competition. **Mylan is not accused of misrepresenting its products as such or causing harm to its competition.** Mylan is charged with: 1) cornering the market for L&C and driving out its competition thereby violating Sherman Antitrust laws; 2) then drastically raising the price of L&C; 3) reporting a higher price than what providers paid for its drugs so that the latter could get government funded "kickbacks" for prescribing/selling its drugs, a/k/a "marketing the spread"; and 4) **subsequent** to being indicted,

attempting to cover up the aforementioned by its "fair price campaign". Thus, Mylan's referenced cases are inapposite. No case exists that has found a duty to defend under similar circumstances.

Mylan cites several cases which it claims are analogous to the situation here, but each are easily distinguished. For instance, an Illinois court in *Flodine v. State Farm Ins. Co.* No. 99 C 7466, 2001 U.S. Dist. Lexis 2204 held that State Farm owed its insured (Flodine) a defense for claims that the latter advertised by ". . . attaching tags to goods that presumably would be distributed to stores and displayed nationwide". *Id.* at 33. The tags created the false impression that the products were Indian-made when they were not. *Id. Flodine* also recognizes the ". . . requirement of a causal nexus between the advertising injury and the advertising activity; i.e., the injury for which coverage is sought must be caused by the advertising offense itself rather than by some other wrongful act, and it must result from the 'advertising activity' involved rather than from other causes." *Id.* at 29.

Similarly, in *Native Am. Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729 (7th Cir. Ill. 2006), another Illinois court found that coverage was excluded. Both it and *Flodine* represent situations where "advertisement" was intended to foster sales of mislabeled products, which caused injury or damages to the competition, i.e. Native American Indians.

This distinction is explained further in *Armament Sys. & Procedures, Inc. v. Northland Fishing Tackle, Inc.*, 2006 U.S. Dist. LEXIS 61371 (E.D. Wis. No. 01-C-1122), which interpreted *Flodine,* supra, as follows:

> *Flodine* stands for the principle that a false claim of geographic or ethnic origin can give rise to an advertising injury, but only when the injury is visited upon a distinct group that can legitimately claim its way of doing business has been misappropriated. Northland cannot make such a claim here.

Applying this interpretation to the facts before it, the *Armament* court reasoned that: "falsely advertising that something is made in the United States might deceive consumers, but doing so does not "misappropriate" anyone's "style" of doing business." *Id.* at 5.

Likewise, in *Am. Simmental Ass'n., supra*, applying Montana law, the **underlying plaintiffs were owners/sellers** of fullblood Simmental cattle who claimed "that the ASA falsely advertised the status of 'Risinger cattle' [owned by Tom Risinger, a board member of the ASA] as 'fullblooded' Simmental cattle, causing plaintiffs to lose customers and sales . . ." *Id.* at 1024. The adverse impact to the competition was an estimated 50% reduction in sales. *Id.* at 1026. Thus, ASA was entitled to a defense because it was accused of having misappropriated the "fullblood Simmental" label as a sales tool to increase sales of its product, which damaged the competition.

Atlapac Trading Co., Inc. v. Am. Motorists Ins. Co. No. CV 97-0781 CBM, 1997 U.S. Dist. Lexis 2193 is governed by California law, and involved an underlying claim by Atlapac's competitor, which sold pure olive oil. **The competitor** alleged that Atlapac falsely advertised its product as "pure olive oil" in spite of the fact that it was blended with other less desirable oils, which had a direct and negative impact on the competitor's business. The court found the policy at issue to be ambiguous and found that the false designation potentially triggered coverage.

None of the cases above involved an insured's "marketing the spread" scheme in which costs were fraudulently inflated, or a part of it's subsequent "cover up" via Mylan's public relations announcements after its indictment claiming it was supporting a "fair pricing campaign." Rather, the cases involved "advertising ideas", i.e. Indian-made, Fullblooded Simmental, Pure Olive Oil, which were misappropriated and used to boost sales of their products and to hurt the competition, for which the competitors actually sought recovery.

Mylan has further cited and relied on several cases in its brief that are no longer good law or have been superceded, severely criticized, or called into question. First, Mylan cites to *Am. Simmental Assoc. v. Coregis Ins.* Co., 75 F.Supp.2d 1023 (D.Neb. 1999) and incorrectly asserts that this case has been affirmed on appeal. Mylan's reliance on this case is false and this case was actually reversed in part by the Eighth Circuit Court of Appeals, 282 F.3d 582 (2002).

Mylan also cites to the case of *Nat'l Union Fire Ins. Co. v. Siliconix, Inc.*, 729 F.Supp. 77, (N.D. Cal. 1989). However, this case was superseded by statute as enunciated in the case of *Zurich Ins. Co. v. Sunclipse, Inc.*, 85 F. Supp.2d 842 (N.D. Ill. 2000).

The case of *American Econ. Ins. Co. v. Reboans, Inc.*, 852 F. Supp. 875 (N.D. Cal. 1994), cited by Mylan, has been called into question by two separate decisions. Specifically, the cases of *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group*, 50 Cal. App.4th 548 (1996) and *Lebas Fashion Imports of USA, Inc. v. Hartford Ins. Group*, 44 Cal. App.4th 531 (1996). This case was also expressly criticized in the subsequent decision of *Dogloo, Inc. v. Northern Ins. Co.*, 907 F. Supp. 1383 (1995).

THE L&C ACTIONS

Mylan's devious analysis continues in its "linguistic analysis" and citation to cases such as *American Simmental Assoc. v. Coregis Ins. Co.*, 75 F. Supp. 2d 1023, 1031 (Dist. Neb. 1999) affirmed at 282 F.3d 582 (8th Cir. 2002 applying Montana law) in which it was claimed that cattle are allegedly "full blood American Simmental, when they are not" and the several similar cases in footnote 58 on page 22. All of them involve claims brought by individual or groups of competitors against another competitor. They were not claims brought by the prosecuting attorneys. The state was not seeking criminal penalties. The citations to these cases do not support the conclusion Mylan

strives to advance in this Court, that generalities stated in a vacuum are sufficient to establish an advertising injury.

Once again, Mylan parses and quotes out of context in an effort to confuse the Court. It focuses on the minutia and overlooks the context in the broader scope of those cases. Regardless of what citations appear in those cases, they are not applicable outside the context in which those cases arose. They do not apply to cases brought by the FTC and the State Attorneys General or third party medical insurers.

Mylan relies heavily on *American Simmental* but overlooks the fact that the plaintiffs in that case were members of the ASA, a nonprofit association that registers and promotes the designation of Simmental cattle breed. They and their members were competitors and were personally damaged by the conduct of the insured.

Those were interests of a competitor, not interests of a third party payor. Medicaid and Medicare insurers, which are the third parties in our case, had only the economic interest in the reimbursement system to the extent that it be honest and fair. They did not have a proprietary interest in the dollar amount of each prescription or the description of any prescription. Mylan's false statements in its news releases do not qualify as an advertising activity. They were merely self-serving remarks by Mylan's public relations spokespersons at a news conference after indictments had been announced, intended to justify and put a positive spin upon Mylan's prior criminal activities.

> "100. On December 23, 1998, the day following the filing of the FTC action, Patricia Sunseri, Mylan Vice President, responded in a press release: "As a Mylan executive, let me tell you the company's position on this issue: First, Mylan has done nothing wrong.... Second.... Third....Fourth...". (The Health Care Services Corp. v. Mylan Labs ¶100 cited at pp. 40-41 of Mylan's brief).

Although Mylan seems to think these allegations describe an advertising activity, any fair reading of that allegation reveals that it is nothing but a press release after the criminal indictments for past conduct seeking to avoid public outrage for its criminal acts.

Medicare's interest is only to reimburse actual pharmaceutical costs, regardless of the reputation of the good, the product, the service, or the reputation of the manufacturer or any of its competitors. Their interest in the accuracy of a pricing situation was not a proprietary interest. Therefore, Mylan's argument fails.

B. The L&C Actions are Criminal Antitrust Enforcement Actions, Not Civil Actions for Damages or for Bodily Injury.

As noted previously, the L&C Actions were enforcement actions filed by federal agencies, not by competitors of Mylan.

The criminal, and quasi-criminal, complaints address the conspiracy between Mylan and its suppliers to corner the market; exclude other competitors; and to engage in practices which multiplied the cost of generic medications by several hundred percent, in violation of law.

The "fair pricing campaigns" embarked upon by Mylan were not the conduct upon which these enforcement actions were based. Rather, they were after-the-fact press releases prepared after the offending conduct had been completed and after the initiation of prosecutorial actions. They were merely intended to spin the news of the announcement of criminal indictments and they were actually a cover up scheme to divert attention from its prior criminal conduct. Therefore, the allegations and references to those statements and certain press conferences had nothing whatsoever to do with the underlying conduct which was the basis for the criminal complaints.

These enforcement actions are not civil actions for damages, and they were not claims for "bodily injury". In order to invoke a duty to defend for same, Mylan was required to prove that the underlying actions were claims for "bodily injury" and caused by an "occurrence". However, the

Circuit Court below properly found that the L&C Actions involve only "economic injury". It further found that Mylan's price increases for Lorazepam and Clorazepate by 1,900-2,000% after its entry into the exclusive licensing agreements with ingredient suppliers, were not allegations of an "occurrence". (See page 35 of Judge Stone's Order).

As, the Circuit Court noted, "even if the L&C suits did allege bodily injury", they did not contain allegations of an "occurrence" as defined under West Virginia law. The Circuit Court properly found that Mylan's increase in prices of its drugs was an "intentional act", not an accident and that the consequences were reasonably foreseeable by Mylan. (p. 35 of Judge Stone's Order).

The Circuit Court did not see the need to proceed further with the analysis since there was no evidence of coverage in the first place. However, even if the L&C Actions or the AWP Actions alleged "advertising injury", or "bodily injury", those actions would have been excluded under numerous provisions of the policies, as set forth in Wausau's brief in support of its motion for summary judgment (filed 6/22/07) and related documents.

Mylan admits that "bodily injury" coverage under Wausau's policy is only conceivably triggered when persons actually seek recovery for "bodily injury". Mylan's L&C MSJ at 15, ¶2. But, the L&C Actions are not claims by persons seeking recovery for "bodily injury".

Mylan acknowledges that the underlying claimants are not the unidentified individuals that may have been injured in some unspecified way. Yet, Mylan argues that the Attorneys General filed an action as *parens patriae*, on behalf of the citizens. It is true that State Attorneys General may obtain *parens patriae* authority to bring actions on behalf of state residents for antitrust offenses. Blacks Law Dictionary 1114 (6th ed. 2004). However, this authority does not give the state a right to sue for bodily injury of competent adults, a right which belongs to the individual and may not be compromised by a suit brought by the State Attorney General. The United States Supreme Court

has consistently denied *parens patriae* to state plaintiffs whenever it appeared that the individual citizens were capable of maintaining and prosecuting their own actions for relief. See e.g. *Pennsylvania v. New Jersey*; *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); see also *New Hampshire v. Louisiana* 108 U.S. 76 (1883).

Therefore, no "bodily injury" claims have been asserted and no claims for recovery for "bodily injury" have been made, nor could they be. Mylan has not identified any such claims. It only argues the possibility, i.e. ". . . potential 'bodily injury' . . .", which does not satisfy its burden to prove either coverage or the duty to defend is triggered. Mylan's Op. at 13, ¶1. In fact, Mylan admitted to the Circuit Court that "Mylan has never claimed that the L&C plaintiffs stated a cause of action for 'bodily injury'." Mylan's Reply, etc., filed August 9, 2007.

C. Even if the AWP Actions and/or L&C Actions Allege Advertising Injury, the Knowing Falsehood Exclusion Applies.

Even if the Court accepts Mylan's expansive and tortured reading of the "advertising injury" definition and the allegations of the underlying complaints, there is still no duty to defend because the Knowing Falsehoods Exclusion. *See*, Appendix to Wausau's Brief in Opposition to Petition for Appeal. This exclusion bars coverage for advertising injury "arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity."

Knowing Falsehoods Exclusions are valid and enforceable and relieve an insurer of the duty to defend when the allegations of the underlying complaint make it clear that the insured knew its allegedly wrongful statements were false. *State Bancorp, Inc.*, 199 W.Va. at 109, 483 S.E.2d at 238 (1997) (insurer had no obligation to defend a defamation claim where the allegations in the underlying complaint was clear that the alleged act – the issuance of a letter containing the allegedly defamatory statements – was intentional); *Community Antenna Servs, Inc. v. Westfield Ins. Co.*, 173 F. Supp. 2d 505, 513 (S.D.W.Va. 2001) (applying West Virginia law) (insurer had no duty to defend

a potential disparagement claim since the allegations in the underlying complaint – *e.g.* "such representations were illegal and knowingly false representations instigated by defendant" and the insured "engaged in misrepresentations intended to interfere with and cause the loss of plaintiff's customers" – made it clear that the insured was accused of knowing conduct); *see also Atlantic Mut. Ins. Co. v. Terk Tech. Corp.*, 309 A.D.2d 22, 31-2 (N.Y. App. Div. 2003) (Knowing Falsehoods Exclusion can obviate a duty to defend where the underlying allegations establish knowing and intentional conduct).

The AWP Actions consistently allege fraud by Mylan. Fraud requires a showing that the defendant knew its statements were false. *Connick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 496 (Ill. 1996). Moreover, the AWP Actions uniformly allege that Mylan knew its reported AWPs were false. See Exhibit 5 to Wausau's Brief in Opposition to Petition for Appeal. Thus, the Knowing Falsehoods Exclusion applies.

Mylan maintains that the enumerated offense of "misappropriation of advertising ideas" is triggered by allegations in the L&C Actions about its "fair pricing campaign," namely that Mylan claimed – after its antitrust violations were discovered -- that its price increases for Lorazepam and Clorazepate were the result of competitive pressures, not anticompetitive exclusive API supply agreements. However, the L&C Actions allege these fabricated justifications by Mylan for its prior illegal acts were known by Mylan to be false. See Exhibit 4 to Wausau's Brief in Opposition to Petition for Appeal. Thus, the Knowing Falsehoods Exclusion applies to these allegations.

Mylan also argues that the offense of "use of another's advertising idea in your 'advertisement'" is triggered by allegations in the L&C Actions that Mylan engaged in a campaign of blaming non-existent raw materials shortages and name brand pharmaceutical companies for its price increases. However, the L&C Actions uniformly allege that Mylan's campaign in this regard

was also based upon statements known by Mylan to be false. See Exhibit 4 to Wausau's Brief in Opposition to Petition for Appeal. Thus, the Knowing Falsehoods Exclusion applies to these allegations as well.

D. Even if the AWP Actions Allege Advertising Injury, the "Wrong Description of Price Exclusion Applies".

The Wrong Description of Price Exclusion bars coverage for advertising injury arising out of "the wrong description of the price of goods, products or services.":

> "(b)(3) for "Advertising Injury" arising out of "The wrong description of the price of goods, products or services; (1997-2000 policies).
>
> (a)(8) Arising out of the wrong description of the price of goods, products or services stated in your "advertisement";" (2000-2001 policy).

The AWP Lawsuits fall squarely within the scope of this exclusion since they are based upon Mylan's wrong (indeed, fraudulent) descriptions of the price of its products. *Bigelow v. Liberty Mut. Ins. Co.*, 287 F.3d 242, 25 (2nd Cir. 2002); *Superperformance Int'l., Inc. v. Hartford Cas. Ins. Co.*, 203 F.Supp.2d 587 (E.D. Pa. 2002); *Am. Western Home, Inc. v. Lovedy*, 2006 WL 374-0874 (E.D. Tenn. 2006); *New Hampshire Ins. Co., v. Power-O-Peat, Inc.*, 907 F.2d 58 (8th Cir. 1990); *Applied Bolting Tech. v. USF&G, supra*; and *Hobson v. Robinson*, 2005 WL 1660267 (N.D. Miss. 2005); and *Skylark Tech. v. Assurance Corp. of Am.*, 400 F.3d 982 (7th Cir. Ill.).

E. Even if the AWP Actions Allege Advertising Injury, the Prior Publication Exclusion Applies.

The Prior Publication Exclusions bar coverage for advertising injury "arising out of oral or written publication of material whose first publication took place before the beginning of the policy period."

> "(a)(2) " Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period; (1997-2000 policies).

(a)(3) Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period;" (2000-2001 policy).

All that is required to trigger the Prior Publication Exclusion is the publication, before the beginning of the policy period, of "substantially the same material" as that published during the policy period, regardless of whether the "material is literally restated in precisely the same words." *Ringler Assoc., Inc. v. Md. Cas. Co.*, 80 Cal. App. 4th 1165, 1182, 96 Cal. Rptr. 2d 136, 150 (Cal. Ct. App. 2000). See also *Maxtech Holding, Inc. v. Federal Ins. Co.*, 202 F.3d 278 (9th Cir. 1999); *Federal Ins. Co. v. Learning Group Int'l, Inc.*, 56 F.3d 71 (9th Cir. 1995); *Scottsdale Ins. Co. v. Sullivan Properties, Inc.*, 2006 WL 505170 (D. Haw. Feb. 28, 2006); *Interlocken Int'l Camp, Inc. v. Markel Ins. Co.*, 2003 WL 881002 (D.N.H. March 4, 2003); *Finger Furniture Co., Inc. v. Travelers Indem. Co. of Connecticut*, 2002 WL 32113755 (S.D. Tex. Aug. 19, 2002); *Doskocil, Inc. v. Fireman's Fund Ins. Co.*, 1999 WL 430755 (N.D. Cal. June 17, 1999), aff'd 41 Fed. Appx. 75 (9th Cir. 2002); *Applied Bolting Tech., supra*, 942 F.Supp. 1029.

Here, the AWP Lawsuits allege that Mylan's fraudulent reporting of AWPs began at least by 1994 or 1995, and possibly as early as 1992. See Exhibit 6 to Wausau's Brief in Opposition to Petition for Appeal. Wausau can have no duty to defend under any of its insurance policies that incepted after Mylan began its fraudulent reporting of AWPs.

F. Even if the L&C Actions Allege Bodily Injury Caused by an Occurrence, then the Claims Would Be Excluded by the Following Exclusions:

1) Expected or intended exclusion

The Wausau Policies exclude coverage for bodily injury "expected or intended from the standpoint of an insured." This Expected/Intended Exclusion applies when Mylan commits an intentional act and expects or intends the resulting damage. *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 210 W.Va. 394, 557 S.E.2d 801, 807 (2001); *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W.

Va. 250, 617 S.E.2d 797, FN. 2 (2005); *Minnesota Fire & Cas. Co. v. Greenfield*, 855 A.2d 854, 859 (Pa. 2004) (Expected/Intended Exclusion applies when the insured intends its act to produce occurring damage).

In *State Bancorp, Inc. supra*, 199 W. Va. at 107, the West Virginia Supreme Court held Expected/Intended Exclusion applied to relieve the insurer of any duty to defend against claims for breach of contract, outrage, civil conspiracy, and violation of state banking laws. The Court stated, "the facts alleged in the complaint which form the basis of the tort of outrage, tort of civil conspiracy, and violation of state banking laws counts are intentional acts of the insured. Thus, we conclude that the allegation of the intentional scheming by the [insured] to gain control of the [underlying plaintiff's] property is not reasonably susceptible of an interpretation that the claims are covered under the provisions of coverage." *Id.* See also *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 381, 376 S.E.2d 581, 587 (1988) (the Expected/Intended Exclusion applied to allegations of sexual misconduct because the insured's intent to injure is inferred as a matter of law; this result is consistent with the doctrine of reasonable expectations because the insured could not reasonably expect insurance for its sexual misconduct).

For the same reasons there is no "occurrence" alleged in the L&C Actions, the Expected/Intended Exclusion applies. Mylan knowingly and intentionally entered into exclusive agreements with API suppliers in order to gain complete control over the API market, and then dramatically increased the prices of its drugs. The L&C Actions uniformly allege intentional and knowing anticompetitive conduct. See Exhibit 3 to Wausau's Brief in Opposition to Petition for Appeal. Any reasonable person would necessarily expect that some consumers would not be able to afford their medicines once the price was dramatically raised. Mylan could not possibly have had a reasonable expectation of insurance for the damage caused by its monopolistic price increases.

2) Products completed operations exclusion

The Wausau policies are endorsed to expressly exclude coverage for "'bodily injury' ... included within the 'products-completed operations hazard.'" The policies define "products-completed operations hazard" to include "all bodily injury ... occurring away from premises [the insured] own[s] or rent[s] and arising out of [the insured's] product or [the insured's] work." These exclusions apply to any purported "bodily injury" in the L&C Actions since such "bodily injury" occurred away from Mylan's premises and arose out of Mylan's products.

III. CONCLUSION

For the reasons assigned, therefore, the Circuit Court properly rejected Mylan's claims for the cost of defense and/or indemnity coverage under the Wausau policies. Accordingly, Wausau respectfully suggests that this court should reject Mylan's appeal in the West Virginia Supreme Court.

Respectfully submitted,

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

MYLAN LABORATORIES INC., et al.

Petitioners and
Civil Case Plaintiffs,

Supreme Court Docket No. _____

v.

Civil Action No.: 07-C-69

AMERICAN MOTORISTS INSURANCE COMPANY, et al.

Civil Case Defendants.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing ***Brief by Appellee Wausau Insurance Company in Opposition*** upon the following by depositing true copies thereof to their last known address in the regular manner, United States Mail, postage prepaid from Huntington, West Virginia on the 9th day of February, 2009:

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